

## **CONSERVATION RESTRICTION TO THE KESTREL TRUST AND THE TOWN OF AMHERST**

### **I. Grantor Clause:**

I, Ruth Johnson having an address at 1114 South East Street, Amherst, County of Hampshire, Massachusetts, and my successors and assigns ("Grantor" or "Owner"), acting pursuant to Sections 31, 32, and 33 of Chapter 184 of the General Laws, for consideration of \$150,000 do hereby grant The Kestrel Trust, a Massachusetts non-profit corporation based in Amherst, Massachusetts, and its successors and permitted assigns ("Kestrel") and the Town of Amherst, acting by and through its Conservation Commission by authority of MGL 40, Section 8C, its successors and permitted assigns (the "Town") (Kestrel and the Town are referred to as the "Grantees"), in perpetuity and exclusively for conservation purposes, the following described Conservation Restriction on a parcel of land located at 1114 South East Street in Amherst, MA, constituting approximately 14.5 acres of a 16.5 acre parcel, said parcel being described in Exhibit A attached (the "Premises"), including a Land Plan. For Owners' title see Hampshire Registry of Deeds Book 1924 Page 139.

### **II. Purposes:**

This Conservation Restriction is defined in and authorized by Sections 31-33 of Chapter 184 of the General Laws and otherwise by law. The purpose of this Conservation Restriction is to assure that the Premises will be maintained in its current condition in perpetuity and for conservation purposes, predominantly in a natural, scenic and undeveloped condition, and to prevent any use or change that would materially impair or interfere with its conservation and preservation values. The CR is purchased with funds from the Executive Office of Environmental Affairs Conservation Partnership Grant Program and the Town of Amherst Community Preservation Act.

The Premises, comprised of approximately 14.5 acres out of 16.5 acres of open farmland, wetlands, and forest. The Premises contains unique or outstanding qualities the protection of which in their predominantly natural or open condition will be of benefit to the public. These include:

- **Agricultural Preservation:** The Premises is two-third active agricultural land and one-third forested wetland that contributes to a block of protected agricultural lands in South Amherst. This Conservation Restriction is designed to encourage sound soil management practices in accordance with normally accepted agricultural practices, preserve natural resources, and allow the Premises to remain in active agricultural use.
- **Water Resources:** Approx 60% of the Premises is in MA DEP Zone II Wellhead Protection Zone, and contains significant wetlands, which all drain north into Hop Brook.
- **Landscape Conservation:** The Premises adds to an existing complex of conservation land and protected agricultural land, including the 600-acre Lawrence Swamp Conservation Area and hundreds of acres of APR land. The Premises is part of a mosaic of grasslands, agricultural lands, and other open space between the Fort River and the Mt.

Holyoke Range in Amherst and Hadley.

- **Biodiversity:** Abutting the Lawrence Swamp Conservation Area, the edge habitat and open field on the Premises provide favorable conditions for a number of birds and other rare species found in this area, such as the wood turtle and the American bittern. This also contains a number of state listed plant species, including rare orchids.
- **Scenic Viewsheds:** The Premises is directly in the viewshed of the Robert Frost Trail, which is on the adjacent town land in the Lawrence Swamp, affording the public a protected and unaltered view of the Mt. Holyoke Range.
- **Furtherance of Government Policy.** Protection of the Premises furthers the Town of Amherst's Open Space and Recreation Plan, including the protection of the Town's scenic landscape, the protection of forest and farmland, the protection of the Town and Region's water resources.

### **III. Prohibited Acts and Uses, Exceptions Thereto, and Permitted Uses:**

#### **A. Prohibited Acts and Uses.**

Subject to the exceptions set forth in paragraph B below, the Owner(s) will neither perform nor allow others to perform the following acts and uses, which are prohibited on, above, and below the Premises:

1. Constructing or placing of any temporary or permanent building, tennis court, landing strip, mobile home, swimming pool, golf course, fences, asphalt or concrete pavement, road, sign, billboard or other advertising display, antenna, utility pole, tower, conduit, line or other temporary or permanent structure or facility on or above the Premises;
2. Mining, excavating, dredging or removing from the Premises of soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit;
3. Placing, filling, storing or dumping on the Premises of soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste or other substance or material whatsoever or the installation of underground storage tanks;
4. Cutting, removing, or otherwise destroying trees, grasses or other vegetation;
5. The subdivision of the Premises; no portion of the Premises may be used toward building requirements on this or any other lot;
6. Activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation or archaeological conservation;

7. The use, parking, or storage of motorized vehicles, including ATVs, motorcycles, campers, trail bikes, and snowmobiles, except as necessary by safety officials in the performance of their lawful duties;
8. The use of the Premises for more than *de minimis* commercial recreation, business, residential or industrial uses of the Premises.
9. Any form of commercial horse or pony riding or horse and pony boarding on the Premises."
10. Any other use of the Premises or activity which would materially impair scenic and conservation interests unless necessary in an emergency for the protection of the conservation interests that are the subject of this Conservation Restriction.

B. Reserved Rights and Exceptions to Otherwise Prohibited Acts and Uses.

The following acts and uses otherwise prohibited in subparagraph A are permitted on the Premises but only if such acts or uses do not materially impair conservation interests:

1. Recreational Activities: Fishing, boating, hiking, horseback riding, cross-country skiing and other non-motorized outdoor recreational activities that do not materially alter the landscape, do not degrade environmental quality, or do not involve more than *de minimis* use for commercial recreational activities;
2. Agricultural Activities: Farming and animal husbandry operations shall be carried out with a Farm Conservation Plan, prepared by the USDA/Natural Resource Conservation Service or similar plan by an accredited group whose purposes include farm best management practices, including but not limited to the cultivation of fields, and the mowing and grazing of meadows. The Grantor shall use her best efforts to keep the land in active agricultural use, but allowing the land to go fallow is not a violation of this Restriction.
3. Vegetation Management and Forestry: In accordance with generally accepted forest management practices, removing of brush, selective *de minimus* pruning and cutting to prevent, control, or remove hazards, disease, insect or fire damage, or to preserve the present condition of the Premises, including the existing trails and meadows as shown on Baseline Survey. The cutting and harvesting of trees for commercial timber production but only if carried out in accordance with a forest management plan prepared by a Massachusetts certified professional forester and a M.G.L. c.132 Forest Cutting Plan approved by The Department of Conservation and Recreation acting by and through its State Forester (or any successor agency), and designed to protect the conservation values of the Premises, including, without limitation, water quality, water features, scenic views, wildlife habitat, biodiversity, etc.

3. Wildlife Habitat Improvement: With the prior written permission of Grantees, measures designed to restore native biotic communities, or to maintain, enhance, or restore wildlife, wildlife habitat, or rare or endangered species including selective planting of native trees, shrubs, and plant species.
4. Fences: The placing of sight pervious fences that do not interfere with the passage of wildlife or the conservation purposes of this restriction and do not, by their material (such as chain-link and impervious fencing) detract from the scenic character of the landscape.
5. Non-native or nuisance species: The removal of non-native or invasive plants or poison ivy from the woodland and Meadow.
6. Archaeological Investigations: Professional archaeological investigation of historic landscape features with the approval of the Grantees and the State Archaeologist of the Massachusetts Historical Commission (*or appropriate successor official*);
7. Water Wells: Digging or drilling of water wells for the use of the excluded house lot or for agricultural activities on the Premises. Water wells should first be located in the excluded building envelope, and only on the Premises if not feasible within the building envelope.
8. Structures: Construction of small structures under 500 square feet incident to woodland, farming, and animal husbandry operations on the Premises and not damaging to the scenic character of the farmstead.
9. Vehicles: The use and temporary parking of motorized vehicles necessary for managed forestry, farming, and animal husbandry operations carried on in accordance with their respective plans outlined in Section B 2 and 3, and access by emergency vehicles.
10. Composting: The maintenance of piles of limbs, brush, leaves, and similar biodegradable material originating on the Premises, provided such piles do not interfere with the conservation objectives of this Conservation Restriction.
11. Signs: Erection of signs by the mutual consent of Owner and Grantees to educate the public about protected conservation values and limitations relating to public access.
12. Trails: The marking, clearing and maintenance of existing footpaths and trails, which are to be not wider than five feet.
13. Permits: The exercise of any right reserved by Grantor under this Paragraph B shall be in compliance with zoning, the Wetlands Protection Act, and all other applicable federal, state and local laws, rules, regulations, and permits. The inclusion of any reserved right requiring a permit from a public agency

does not imply that the Grantees or the Commonwealth takes any position whether such permit should be issued.

- C. Permitted Acts and Uses. All acts and uses not prohibited by subparagraphs A and B are permissible provided they do not materially impair the purposes or conservation values of this conservation restriction.
- D. Notice and Approval. Whenever notice to or approval by Grantees is required under the provisions of paragraphs A or B, Grantor shall notify both Kestrel and the Town in writing not less than sixty (60) days prior to the date Grantor intends to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable and any other material aspect of the proposed activity in sufficient detail to permit the Grantees to make an informed judgment as to its consistency with the purposes of this Conservation Restriction. Where Grantees' approval is required, Kestrel shall, within thirty (30) days of receipt of Grantor's request, notify the Town of Kestrel's decision. Following receipt of Kestrel's decision, but in no case later than sixty (60) days following the Town's receipt of Grantor's written request, the Town shall either affirm or disagree with Kestrel's decision. The approval of Kestrel and the Town shall not be unreasonably withheld. In the event that no decision is received from Kestrel within said thirty (30) days, the request shall be deemed approved by Kestrel, and the Town shall proceed to issue its decision within sixty (60) days of receipt of Grantor's written request. Failure of the Town to act within said sixty (60) days shall be deemed to constitute approval of either the Kestrel's decision, if one has been issued, or, in the absence of a Kestrel decision, of Grantor's request as submitted, provided the notice includes this provision as to deemed approval. Approval under this paragraph D shall require the approval or deemed approval of both Kestrel and the Town.

#### **IV. Costs and Expenses**

The Owner and her heirs, successors, and assigns shall retain all of the responsibilities, liabilities, and costs related to ownership, upkeep and maintenance of the Premises, including payment of real estate taxes. The Grantees assume and shall incur no such liabilities or costs.

#### **V. Legal Remedies of the Grantees:**

##### **A. Legal and Injunctive Relief**

The rights hereby granted shall include the right to enforce this Conservation Restriction by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations, including, without limitation, relief requiring restoration of the Premises to its condition prior to the time of the injury complained of (it being agreed that the Grantees will have no adequate remedy at law), and shall be in addition to, and not in limitation of, any other rights and remedies available to the Grantees for the enforcement of this Conservation Restriction.

Grantor covenants and agrees to reimburse to Grantees all reasonable costs and expenses (including reasonable counsel fees) incurred in enforcing this Conservation Restriction or in taking reasonable measures to remedy, abate or correct any violation thereof, provided that a violation of this Conservation Restriction is acknowledged by Grantor or determined by a court of competent jurisdiction to have occurred.

B. Non-waiver

Enforcement of the terms of this Conservation Restriction shall be at the discretion of the Grantees. Any election by the Grantees as to the manner and timing of its right to enforce this Conservation Restriction or otherwise exercise its rights hereunder shall not be deemed or construed to be a waiver of such rights. Either Kestrel or the Town, or the Grantees together, may exercise the enforcement rights granted hereunder.

C. Disclaimer of Liability

By its acceptance of this Conservation Restriction, the Grantees do not undertake any liability or obligation relating to the condition of the Premises pertaining to compliance with and including, but not limited to, hazardous materials, zoning, environmental laws and regulations, or acts not caused by the Grantees or their agents.

E. Acts Beyond the Grantor's Control

Nothing contained in this Conservation Restriction shall be construed to entitle the Grantees to bring any actions against the Grantor for any injury to or change in the Premises resulting from causes beyond the Grantor's control, including but not limited to fire, flood, storm and earth movement, or from any prudent action taken by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Premises resulting from such causes.

**VI. Access:**

- A. The Owner reserves for herself, her heirs and assigns the right to privacy. The Conservation Restriction hereby conveyed does not grant to the Grantees, to the general public, or to any other person any right to enter upon the Premises except there is granted to the Grantees and their representatives the right to enter the Premises at reasonable times and in a reasonable manner for the purpose of inspecting the same to determine compliance herewith.
- B. The Owners also grant to the Grantees, after 30 days notice of a violation and failure of the Owner to cure said violation, the right to enter the Premises for the purpose of taking any and all actions with respect to the Premises as may be necessary or appropriate to remedy or abate any violation hereof, including but not limited to the right to perform a survey of boundary lines conducted at the Owner's expense.

## **VII. Extinguishment:**

### **A. Right of Grantees to Recover Proportional Value at Disposition.**

If circumstances arise in the future such as render the purpose of this Conservation Restriction impossible to accomplish, this restriction can only be terminated or extinguished, whether in whole or in part, by a court of competent jurisdiction under applicable law. If any change in conditions ever gives rise to extinguishment or other release of the Conservation Restriction under applicable law, then Grantees, on a subsequent sale, exchange, or involuntary conversion of the Premises, shall be entitled to a portion of the proceeds in accordance with paragraph B below, subject, however, to any applicable law which expressly provides for a different disposition of the proceeds. Grantees shall use their share of the proceeds in a manner consistent with the conservation purpose set forth herein.

### **B. Proceeds.**

The Owners and the Grantees agree that the donation of this Conservation Restriction gives rise to a real property right, immediately vested in the Grantees, with a fair market value that is at least equal to the proportionate value that this Conservation Restriction determined at the time of the gift bears to the value of the unrestricted Premises at that time. Such proportionate value of the Grantees' property right shall remain constant.

### **C. Owner/Grantees Cooperation Regarding Public Action.**

Whenever all or any part of the Premises or any interest therein is taken by public authority under power of eminent domain or other act of public authority, then the Owner and the Grantees shall cooperate in recovering the full value of all direct and consequential damages resulting from such action.

### **D. Allocation of Expenses upon Disposition.**

All related expenses incurred by the Owner and the Grantees shall first be paid out of any recovered proceeds, and the remaining proceeds shall be distributed between the Owner and Grantees in shares equal to such proportionate value. Any proceeds to be paid to Grantees hereunder shall be shared evenly between Kestrel and the Town.

### **E. Continuing Trust of Grantee's Share of Proceeds of Conservation Restriction Disposition.**

The Grantees shall use their share of the proceeds in a manner consistent with the conservation purposes of this grant.

## **VIII. Assignability:**

### **A. Running of the Burden.**

The burdens of this Conservation Restriction shall run with the Premises in perpetuity, and shall be enforceable against the Owner and the successors and assigns of the Owner holding any interest in the Premises.

**B. Execution of Instruments.**

The Grantees are authorized to record or file any notices or instruments appropriate to assuring the perpetual enforceability of this Conservation Restriction; the Owner on behalf of herself and her successors and assigns appoints the Grantees as her attorney-in-fact to execute, acknowledge and deliver any such instruments on her behalf. Without limiting the foregoing, the Owner and her successors and assigns agree themselves to execute any such instruments upon request.

**C. Running of the Benefit.**

The benefits of this Conservation Restriction shall be in gross and shall not be assignable by the Grantees, except in the following instances and from time to time:

As a condition of any assignment, the Owner requires that the purpose of this Conservation Restriction continue to be carried out, and the assignee, at the time of assignment, qualifies under Section 170(h) of the Internal Revenue Code of 1986, as amended, and applicable regulations thereunder, and under Section 32 of Chapter 184 of the General Laws as an eligible donee to receive this Conservation Restriction directly and the provision of Article 97 of the Massachusetts Constitution are complied with, if applicable.

**IX. Subsequent Transfers:**

The Grantor agrees to incorporate by reference the terms of this Conservation Restriction in any deed or other legal instrument by which he divests himself of any interest in all or a portion of the Premises, including a leasehold interest and to notify the Grantees within 20 days of such transfer. Failure to do so shall not impair the validity or enforceability of this Conservation Restriction. Any transfer will comply with article 97 of the Amendments to the Constitution of the Commonwealth of Massachusetts, if applicable.

The Grantor shall not be liable for violations occurring after his or her ownership. Liability for any acts or omissions occurring prior to any transfer and liability for any transfer if in violation of this Conservation Restriction shall survive the transfer. Any new owner shall cooperate in the restoration of the Premises or removal of violations caused by prior owner(s) and may be held responsible for any continuing violations.

**X. Estoppel Certificates:**

Upon request by the Owner, the Grantees shall within twenty (20) days execute and deliver to the Owner any document, including an estoppel certificate, which certifies the Owner's compliance with any obligation of the Owner contained in this Conservation Restriction.



**XI. Non Merger:**

The parties intend that any future acquisition of the Premises shall not result in a merger of the Conservation Restriction into the fee. The Grantor agrees that it will not grant, and the Grantees agree that they will not take title, to any part of the Premises without having first assigned this Conservation Restriction to ensure that merger does not occur.

**XII. Effective Date:**

This Conservation Restriction shall be effective when the Owners and the Grantees have executed it, the administrative approvals required by Section 32 of Chapter 184 of the General Laws have been obtained, and it has been recorded, or if registered land, it has been registered.

**XIII. Amendment:**

If circumstances arise under which an amendment to or modification of this Conservation Restriction would be appropriate, Owner and Grantees may jointly amend this Conservation Restriction; provided that no amendment shall be allowed that will affect the qualification of this Conservation Restriction or the status of Grantees under any applicable laws, including Section 170(h) of the Internal Revenue Code of 1986, as amended, or Sections 31-33 of Chapter 184 of the General Laws of Massachusetts, and any amendment shall be consistent with the purposes of this Conservation Restriction, shall not affect its perpetual duration, and shall be approved by the Secretary of Energy and Environmental Affairs and if applicable, shall comply with the provisions of Art. 97 of the Amendments to the Massachusetts Constitution, and any gifts, grants or funding requirements. Any such amendment shall be approved by the parties herein and recorded in the Hampshire Registry of Deeds.

**XIV. General Provisions:**

A. Controlling Law.

The interpretation and performance of this Conservation Restriction shall be governed by the laws of the Commonwealth of Massachusetts.

B. Liberal Construction.

Any general rule of construction to the contrary notwithstanding, this Conservation Restriction shall be liberally construed in favor of the grant to effect the purpose of this Conservation Restriction and the policy and purposes of Massachusetts General Laws Chapter 184, Sections 31-33. If any provision in this instrument is found to be ambiguous, any interpretation consistent with the purpose of this Conservation Restriction that would render the provision valid shall be favored over any interpretation that would render it invalid.

C. Severability.

If any provision of this Conservation Restriction or the application thereof to any person or circumstance is found to be invalid, the remainder of the provision of this Conservation Restriction shall not be affected thereby.

D. Entire Agreement.

This instrument sets forth the entire agreement of the parties with respect to this Conservation Restriction and supersedes all prior discussions, negotiations, understandings or agreements relating to the Conservation Restriction, all of which are merged herein.

**XV. Miscellaneous:**

Approval of this Conservation Restriction pursuant to M. G. L. Chapter 184, Section 32 by any municipal officials and by the Secretary of Energy and Environmental Affairs is not to be construed as representing the existence or non-existence of any pre-existing rights of the public, if any, in and to the Premises, and any such pre-existing rights of the public, if any, are not affected by the granting of the Conservation Restriction.

**XVI: Recordation:**

The Owners shall record this instrument in timely fashion in the Hampshire County Registry of Deeds.

WITNESS my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
Ruth Johnson

COMMONWEALTH OF MASSACHUSETTS

Hampshire, ss:

On this \_\_\_\_ day of \_\_\_\_\_, 2009, before me, the undersigned notary public, personally appeared \_\_\_\_\_, proved to me through satisfactory evidence of identification which was \_\_\_\_\_, to be the person whose name is signed on the proceeding or attached document, and acknowledged to me that she signed it voluntarily for its stated purpose.

\_\_\_\_\_  
Notary Public  
My Commission Expires:

ACCEPTANCE OF GRANT

The above Conservation Restriction is accepted by The Kestrel Trust, per a vote taken by The Kestrel Trust Board of Directors on May 21, 2009, this \_\_\_\_\_ day of June, 2009

\_\_\_\_\_  
Margaret Hepler, Chair, The Kestrel Trust

\_\_\_\_\_  
Jim Scott, Treasurer, The Kestrel Trust

COMMONWEALTH OF MASSACHUSETTS

Hampshire, ss:

On this \_\_\_\_ day of \_\_\_\_\_, 2009, before me, the undersigned notary public, personally appeared \_\_\_\_\_, proved to me through satisfactory evidence of identification which was \_\_\_\_\_, to be the person whose name is signed on the proceeding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose as \_\_\_\_\_ of The Kestrel Trust.

\_\_\_\_\_  
Notary Public  
My Commission Expires:

ACCEPTANCE OF GRANT

The above Conservation Restriction was accepted by the Town of Amherst, acting by and through its Conservation Commission pursuant to G.L. c. 40, § 8C, on this \_\_\_\_ day of \_\_\_\_\_, 2009.

Amherst Conservation Commission

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COMMONWEALTH OF MASSACHUSETTS

Hampshire, ss:

On this \_\_\_\_ day of \_\_\_\_\_, 2009 before me, the undersigned notary public, personally appeared \_\_\_\_\_, member of the Amherst Conservation Commission, as a foresaid, proved to me through satisfactory evidence of identification which was \_\_\_\_\_, to be the person whose name is signed on the proceeding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose on behalf of the Town of Amherst.

\_\_\_\_\_  
Notary Public  
My Commission Expires:

APPROVAL BY AMHERST SELECT BOARD

We, the undersigned, being a majority of the Select Board of the Town of Amherst, Massachusetts, hereby certify that at a meeting duly held on \_\_\_\_\_, 2009, the Select Board voted to approve the foregoing Conservation Restriction to the Amherst Conservation Commission and The Kestrel Trust pursuant to M. G. L. Ch. 184, §32.

TOWN OF AMHERST,  
By its Select Board

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COMMONWEALTH OF MASSACHUSETTS

Hampshire, ss

On this \_\_\_\_ day of \_\_\_\_\_, 2009, before me, the undersigned Notary Public, personally appeared \_\_\_\_\_, member of the Select Board of the Town of Amherst, who proved to me through satisfactory evidence of identification, which was \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she/they signed it voluntarily for its stated purpose as member on behalf of the Town of Amherst.

\_\_\_\_\_  
Notary Public  
My Commission Expires

APPROVAL BY THE SECRETARY OF ENERGY AND ENVIRONMENTAL AFFAIRS  
COMMONWEALTH OF MASSACHUSETTS

The undersigned, Secretary of the Executive Office of Energy and Environmental Affairs of the Commonwealth of Massachusetts, hereby certifies that the foregoing Conservation Restriction to The Kestrel Trust has been approved in the public interest pursuant to M.G.L. Ch. 184, §32.

Date: \_\_\_\_\_, 2009.

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Ian A. Bowles  
Secretary of Energy and Environmental Affairs

COMMONWEALTH OF MASSACHUSETTS

Hampshire, ss:

On this \_\_\_\_ day of \_\_\_\_\_, 2009, before me, the undersigned notary public, personally appeared Ian A. Bowles proved to me through satisfactory evidence of identification which was personal knowledge to be the person whose name is signed on the proceeding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose as Secretary of Energy and Environmental Affairs for the Commonwealth of Massachusetts.

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Notary Public  
My Commission Expires:

## Exhibit A

Legal, metes and bounds description, and/or a reference to a recorded or registered plan showing the boundaries. Mention plan if there is one, and where it is recorded, or, "to be filed herewith". Attach an 8 ½ x 11 copy of the plan as an Exhibit ("sketch plan"). **"As further shown on the Plan/Sketch Plan, attached hereto."**

Mention area of CR; "all of a 6 acre lot" or if it is a portion of a lot, say "an \_\_\_\_ acre portion of a \_\_\_\_ acre lot". For building envelopes or exclusions, a legal description of the exclusion(s) is needed, and show on the plan.